Chan Ah Moi v Phang Wai Ann

HIGH COURT (JOHOR BAHRU) — DIVORCE PETITION NO 33-24-1994
ABDUL MALIK ISHAK J
28 JUNE 1995

Family Law — *Relations between husband and wife — Non-molestation order — Prerequisites — Applicability of Domestic Violence Act 1994 — Domestic Violence Act 1994 ss 2, 5 & 13 — Law Reform (Marriage and Divorce) Act 1976 s 103*

Family Law — *Relations between husband and wife — Exclusion order — Whether court can grant order excluding husband from matrimonial home — Civil Law Act 1956 s 3*

This is an ex parte petition by the petitioner as a battered wife. The petitioner and the respondent, her husband, had been living in separate homes for eight years when the respondent attacked the petitioner with a long knife, causing her serious injuries. The respondent was arrested and convicted of an offence under s 326 of the Penal Code (FMS Cap 45) ('the Penal Code'). He was sentenced to 4½ years imprisonment and was expected to be released on 19 August 1995. Due to the pending release, the petitioner petitioned for a non-molestation order against the respondent and an order to exclude him from any part of the matrimonial home in which she was residing and the area where the matrimonial home was located.

Held, allowing the petition:

(1) Under s 103 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), as long as the petitioner has filed proceedings for the dissolution of the marriage or given an undertaking to do so within the time frame set by the court, the non-molestation order will be allowed. This has been satisfied in the present case as the petitioner had filed for the dissolution of her marriage.

(2) There is no provision in the Act for an exclusion order. However, where there is a lacuna in Malaysian law, English common law principles can be invoked as provided under s 3 of the Civil Law Act 1956. Though an exclusion order may appear to be a draconian remedy, it is a necessary evil. Since the respondent would have a house to go to upon his release and need not worry about accommodation, the exclusion order was allowed.

Obiter:

Although s 5 of the Domestic Violence Act 1994 ('the DVA') envisages a long term protection order where the husband is charged with a crime that falls within the definition of domestic violence, when the respondent was sentenced on 7 October 1992, the DVA had not been legislated. If the DVA were applicable when the respondent was charged under the Penal Code, it would have brought him within the

purview of 'domestic violence' as defined under s 2 of the DVA and the protection order envisaged under s 13 of the DVA would have been applicable.

[Bahasa Malaysia summary

Ini adalah suatu petisyen ex parte oleh pempetisyen sebagai seorang isteri yang telah diserang-sentuh. Pempetisyen dan penentang, iaitu suaminya, telah mendiami rumah yang berasingan selama lapan tahun apabila penentang telah menyerang pempetisyen dengan sebilah pisau panjang, dan mengakibatkan kecederaan serius kepada beliau. Penentang telah ditangkap dan disabit atas suatu kesalahan di bawah s 326 Kanun Keseksaan (NMB Bab 45) ('Kanun Keseksaan'). Beliau telah dihukum penjara selama 4½ tahun dan dijangka akan dibebaskan pada 19 Ogos 1995. Oleh kerana penentang akan dibebaskan tidak lama lagi, pempetisyen telah membuat petisyen untuk perintah tidak mencabuli dirinya dan suatu perintah ketakmasukan ke dalam mana-mana kawasan di dalam kediaman suami isteri di mana beliau tinggal dan juga kawasan di mana kediaman suami isteri itu terletak.

Diputuskan, membenarkan petisyen itu:

(1) Di bawah s 103 Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 ('Akta itu'), jika pempetisyen telahpun memfailkan prosiding untuk pembubaran perkahwinan atau memberi akujanji untuk berbuat demikian dalam masa yang ditetapkan oleh mahkamah, perintah tidak mencabuli dirinya itu akan dibenarkan. Ini telah dilakukan oleh pempetisyen di dalam kes ini kerana beliau telah memfailkan prosiding untuk pembubaran perkahwinannya.

(2) Tidak terdapat peruntukan di dalam Akta itu untuk suatu perintah ketakmasukan. Bagaimanapun, di mana terdapat suatu lakuna di dalam undang-undang di Malaysia, prinsip common law di England boleh digunakan seperti yang diperuntukkan oleh s 3 Akta Undang-Undang Sivil 1956. Walaupun suatu perintah ketakmasukan mungkin merupakan suatu remedi yang kejam, ia adalah suatu keburukan yang perlu. Oleh kerana penentang mempunyai rumah untuk kembali kepada apabila dilepaskan dari penjara dan tidak payah memikirkan tentang tempat kediaman, perintah ketakmasukan itu dibenarkan.

Obiter:

Walaupun s 5 Akta Keganasan Rumah Tangga 1994 ('AKRT') membayangkan suatu perintah perlindungan jangka masa panjang di mana si suami telah dituduh atas jenayah yang termasuk dalam definisi keganasan rumah tangga, pada masa penentang dijatuhkan hukuman pada 7 Oktober 1992, AKRT belum diperundangkan. Jika AKRT telah berkuatkuasa pada masa penentang dituduh di bawah Kanun Keseksaan, ini akan membawanya ke dalam erti maksud 'keganasan rumah tangga' yang ditakrif dalam s 2 AKRT dan perintah

perlindungan yang dibayangkan dalam s 13 AKRT juga boleh digunakan.]

Notes

For cases on relations between husband and wife, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2185–2203.

Cases referred to

Bagher Singh v Chanan Singh [1961] MLJ 328 (folld)
Davis v Johnson [1979] AC 264; [1978] 1 All ER 841; [1978] 2 WLR 182 (CA); [1978] 1 All ER 1132; [1978] 2 WLR 553 (HL)(refd)
George v George [1986] 2 FLR 347 (refd)
HG Warren v Tay Say Geok & Ors [1965] 1 MLJ 44 (folld)
Hall v Hall [1971] 1 All ER 762; [1971] 1 WLR 404 (refd)
Hopper v Hopper [1979] 1 All ER 181; [1978] 1 WLR 1342 (refd)
Horner v Horner [1982] 2 All ER 495; [1982] 2 WLR 914 (refd)
Johnson v Walton [1990] 1 FLR 350 (refd)
PP v Seridaran [1984] 1 MLJ 141 (refd)
Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420 (refd)
Vaughan v Vaughan [1973] 3 All ER 449; [1973] 1 WLR 1159 (refd)
Walker v Walker [1978] 3 All ER 141; [1978] 1 WLR 533 (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)
Criminal Procedure Code (FMS Cap 6)
Domestic Violence Act 1994 ss 2, 3, 4, 5, 6, 13
Law Reform (Marriage and Divorce) Act 1976 ss 4, 103
Penal Code (FMS Cap 45) s 326
Domestic Proceedings and Magistrates' Courts Act 1978 s 16(2) [GB]
Domestic Violence and Matrimonial Proceedings Act 1976 ss 1(1)(a), (c), (2) [GB]

Asha Pereira (*Soo & Associates*) for the petitioner.

Abdul Malik Ishak J: This case is yet another example of how a battered housewife goes through life in a nightmare — the nightmare of being brutally assaulted by her own husband. Marriages are said to be made in heaven, with lots of love and affection, and in the context of this case, it culminated in violence.The petitioner here was married to the respondent on 4 October 1963 according to Chinese customary rites (see encl 9, exh CAM1 depicting the marriage photograph and the 'marriage certificate' in Chinese characters not translated for the benefit of the court and would certainly go against the decision of *Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420). Be that as it may, the marriage must have been a happy one because the petitioner bore seven children, four boys and three girls whose ages ranged from 16 to 30

years of age at the time of filing the affidavit in encl 9. Things got out of hand. The respondent behaved unreasonably to such an extent that the petitioner could not stand the sight of him. They decided to live separately at two separate residences for eight solid years. The petitioner stayed at house No 26, Lorong Cengal, Taman Kuso, 81900 Kota Tinggi, Johor while the respondent stayed at house No 19, Jalan Cengal, Taman Kuso, 81900 Kota Tinggi, Johor. In fact, they both stayed in the same housing estate but in separate houses. Despite the separation, the petitioner continued to be abused by the respondent.

The petitioner deposed in her affidavit in encl 9 that sometime in 1991, the respondent repeatedly hit her head with a wooden stool, as a result of which she sustained a deep wound on her head which necessitated hospitalization at Kota Tinggi General Hospital. The doctors there had to stitch her injuries.

On 19 August 1992 at about 10.40pm at a taxi stand, the respondent attacked the petitioner with a 'double lion' knife measuring 13in long and 4in wide causing injuries to the scalp, face and right eye of the petitioner. These injuries could have been fatal. For the petitioner, this must be an instance of extreme violence of a horrifying nature. The timely arrival of Cpl 98711, Mohamad Yusof, must have averted possible death. That corporal witnessed the brutal attack and lodged a police report to that effect — vide Kota Tinggi police report No 2339/93. Dr Norlia Abdullah, the medical officer of Kota Tinggi General Hospital examined the petitioner and in her report she listed the following grievous injuries sustained by the petitioner:

Scalp	— two deep wounds at right pariental region 6cm and at left pariental region 6cm.
Face	— 12cm deep wounds across right eye, root of nose and lateral part right zygomatic area.
Right eye	— corneal laceration, pupil not constricting to light.
X-ray	— compound fracture vertex and nasal bone.
Superficial wound 6cm lateral part right upper arm.	
Diagnosis:	Compound fracture vertex and nasal bone with traumatic injury right eye.

The police investigated the report lodged by Cpl Yusof and in her further affidavit at encl 14, the petitioner deposed that the respondent was charged in the Sessions Court, Kota Tinggi and convicted of an offence under s 326 of the Penal Code (FMS Cap 45) and was sentenced to 4½ years' imprisonment with effect from the date of arrest (19 August 1992). Clearly, that criminal prosecution must be related to the brutal attack on the petitioner at the taxi stand. Currently, the respondent is serving his term of imprisonment at the Simpang Rengam prison and he is expected to be released on 19 August 1995.

The petitioner further deposed in her affidavit in encl 9 that as a result of the several injuries sustained by her as enumerated in Dr Norlia Abdullah's medical report, she suffered tremendous pain and suffering

compounded by disabilities and residuals in the form of permanent scars and deterioration of her vision in her right eye. She feared for her safety and this fear was quite imminent as her husband, the respondent, would soon be released from Simpang Rengam prison and she believed that there was every likelihood of a repetition of that brutal attack experienced by her at the taxi stand. She prayed in her amended ex parte summons-in-chambers (encl 12 at exh AP1) for the following orders:

(1) that the respondent be restrained from molesting the petitioner; and

(2) that the respondent be excluded from the matrimonial home or a part of the matrimonial home or from a specified area in which the matrimonial home is included.

The matrimonial home was said to be at house No 26, Lorong Cengal, Taman Kuso, 81900 Kota Tinggi, Johor.

In the meantime, the petitioner has since filed for dissolution of her marriage, for custody of her youngest child and, lastly, that the respondent not be given reasonable access to the said child (encl 2 para 14).

I shall now proceed to discuss the orders which the petitioner sought for in encl 12 at exh AP1.

That the respondent be restrained from molesting the petitioner

This is in the nature of a non-molestation order. Being married in accordance with Chinese customary rites and not registering the marriage would not bar the petitioner from seeking refuge under the Law Reform (Marriage and Divorce) Act 1976 ('the Act') as she was married on 4 October 1963. That this is so is clearly reflected in s 4(1) of the Act which enacts that:

> Nothing in this Act shall affect the validity of any marriage solemnised under any law, religion, custom or usage prior to the appointed date.

And the petitioner's position under the Act is further fortified by the deeming provision that appears in s 4(2) of the Act which enacts in no uncertain terms that:

> Such marriage, if valid under the law, religion, custom or usage under which it was solemnised, shall be deemed to be registered under this Act.

Now, since the petitioner has filed for dissolution of her marriage presumably under s 4(3)(b) of the Act, it follows that she can seek refuge under s 103 of the Act which enacts that:

> The Court shall have power during the pendency of any matrimonial proceedings or on or after the grant of a decree or divorce, judicial separation or annulment, to order any person to refrain from forcing his or her society on his or her spouse or former spouse and from other acts of molestation.

and by the very words employed in that section, the petitioner seeking protection of this court from the violent respondent is entitled to obtain what is now known as an injunction against molestation. It is germane to mention here that certain prerequisites must be satisfied before s 103 of

A the Act can be invoked. These prerequisites may briefly be stated as follows:

(1) that a petition has been filed in proceedings for dissolution of the marriage; and

B (2) if a petition has not been filed, the petitioner gives an undertaking to file a petition within the time frame as set by the court.

Unfortunately, the word 'molestation' is not defined in the Act. The Britannica World Language Edition of *The Oxford Dictionary* defined 'molestation' as 'the action of molesting or condition of being molested; annoyance, disturbance, vexation'. Whereas the *Pocket Oxford Dictionary of* C *Current English* (4th Ed) compiled by FG Fowler and HW Fowler defined 'molestation' simply as 'troublesome'. Davies LJ, in *Vaughan v Vaughan* [1973] 3 All ER 449; [1973] 1 WLR 1159, CA, referred to two dictionaries for the meaning of the word 'molestation'. His Lordship said this ([1973] 3 All ER 449 at p 452; [1973] 1 WLR 1159 at pp 1162–1163):

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> According to counsel for the husband we find two different definitions respectively in the *Concise Oxford Dictionary* and in the *Shorter Oxford Dictionary*. The former gives the meaning for 'molest' as: 'meddle hostilely or injuriously'. The *Shorter Oxford Dictionary* gives a much wider definition in these terms: 'to cause trouble; to vex; to annoy; to put to inconvenience'.

E *George v George* [1986] 2 FLR 347 and *Johnson v Walton* [1990] 1 FLR 350 adopted Davies LJ's approach to the meaning of 'molestation' in *Vaughan v Vaughan*.

It is quite understandable that what goes on behind the closed doors of the matrimonial home is anyone's guess. But the respondent here who F is currently serving his term in Simpang Rengam prison must be so enraged by his conviction and sentence that he would probably seek revenge upon his release on 19 August 1995. What must the petitioner do to protect herself?

It is clear that the general criminal law is inadequate to deal with domestic violence. The criminal law moves slowly — too slow for comfort. G Battered housewives would simply suffer at the hands of their outraged husbands. There is currently no power under the criminal law to injunct errant husbands from molesting timid housewives.

Battered housewives are now a matter of grave public concern. In an apparent attempt to appease battered housewives, the Government recently H legislated the Domestic Violence Act 1994 ('the DVA') on 24 June 1994. The DVA was subsequently gazetted on 7 July 1994 and it became law on 8 July 1994. But unfortunately for the petitioner, the DVA in its present form would not help the petitioner at all. Domestic violence per se is not a specific crime in the DVA. Section 3 of the DVA shall be read together I with the provisions of the Penal Code. This in turn would necessarily impede investigations as all investigations are governed by the Criminal Procedure Code (FMS Cap 6) ('the CPC'). Thus, the police must first determine the nature of the offence before deciding on the next course of action. If the offence is non-seizable in nature, the police will conduct an

investigation upon receipt of an order to investigate from the deputy public prosecutor. An investigation of a non-seizable offence without an order to investigate from the deputy public prosecutor would render whatever evidence collected illegal (*PP v Seridaran* [1984] 1 MLJ 141). Under the CPC, the police are required to conduct immediate investigations in cases of seizable offences. Taken from this angle, the DVA would be a toothless tiger. I say this because most cases of domestic violence like punching, kicking, assaulting, etc, would fall squarely under the category of non-seizable offences. There is therefore, no immediate need for the police to investigate unless the deputy public prosecutor issues an order to investigate.

The matter is compounded further by the loose definition of 'domestic violence' in s 2 of the DVA which clearly puts it within the category of not only non-seizable but also seizable, and this must surely be the restraining factor before the police investigates the case.

Perhaps the sting in the DVA is found in s 4 where an interim protection order may be obtained pending an investigation. However, as explained earlier, it would be dependent on the nature of the case. If it is non-seizable, a battered housewife may be on the losing end — she may not even be given an interim protection order by the court. Now, even if the court is minded to give her an interim protection order, that order shall cease to have effect upon the completion of the investigations. What good will it do to the battered housewife then? The irate husband will definitely create havoc once the interim protection order is lifted.

Section 5 of the DVA envisages a long term protection order where the husband is charged with a crime in circumstances that fall within the definition of domestic violence like the present case. But unfortunately, when the Sessions Court at Kota Tinggi convicted and sentenced the respondent on 7 October 1992 (see exh CAM1 of encl 14), the DVA had not been legislated and, consequently, the sessions court could not resort to the DVA. Now, if the DVA were applicable to the respondent when he was first produced before the sessions court, the charge under s 326 of the Penal Code levied against the respondent would bring it within the purview of 'domestic violence' as defined under s 2 of the DVA and, consequently, the protection order envisaged under s 13 of the DVA would be applicable.

Be that as it may, without the benefit of the DVA, the petitioner must now rely on s 103 of the Act as adverted to in the early part of this judgment to restrain the respondent from molesting her especially after he is released from prison.

It is interesting to note that the British Domestic Violence and Matrimonial Proceedings Act 1976 ('the BDVMPA') especially s 1(1)(a) thereof contains a provision restraining the other party to the marriage from molesting the applicant and for comparison it is reproduced below:

> Matrimonial injunctions in the county court
>
> Without prejudice to the jurisdiction of the High Court, on an application by a party to a marriage a county court shall have jurisdiction to grant an injunction containing one or more of the following provisions, namely —

A (a) a provision restraining the other party to the marriage from molesting the applicant;

As to whether the petitioner would succeed in establishing molestation would depend on the facts of each particular case.

Reverting back to *Vaughan v Vaughan* [1973] 3 All ER 449; [1973] B 1 WLR 1159, the facts there were that in April 1970, the wife petitioned for the dissolution of her marriage on the ground of cruelty and obtained an interim injunction against molestation by the husband. In May, she was granted a non-molestation injunction pending suit. In August, the husband was committed to prison for breach of that injunction but a month later he C was released after expressing his regret and undertaking to refrain from further disobedience. In October, the wife obtained a decree nisi and on 16 November, a fresh injunction restraining the husband from molesting her. On 25 November, the husband was committed for breach of that order. He was in custody from 1–23 December when he was released again after making an apology and giving an undertaking. On 1 January 1971, D the husband was again committed for contempt. On 14 January, the decree nisi was made absolute. On 6 April, the husband was released and warned as to what would happen if he offended again but on 18 May, as a result of further incidents, he was committed for two months for contempt. Shortly afterwards he was sentenced to 18 months' imprisonment for burglary and other offences from which he was released on 3 June 1972. E From that date until April 1973, he behaved himself. On a number of occasions in April and May however, he pestered his wife to go out with him and to see him and speak to him. Early in the morning and late at night he called on her at her house and also at her place of work making a nuisance of himself to her the whole time. However, in contrast to what F had happened on previous occasions, he committed no acts of violence. He knew she was frightened of him. There was evidence from the wife's doctor that the husband's pestering had affected the wife's health. On 10 May 1973, Faulks J committed the husband to prison for contempt of the 16 November injunction — 'for a period of not less than six months less one day and he ordered the governor of the prison to safely keep (him) G there for six months less one day; and he further directed that he be not at liberty to apply to the court for an order for his release from prison before 9 November 1973'. The husband appealed contending, inter alia, that his conduct did not amount to molestation. On these facts, Davies LJ said:

H > It seems to me that, in the circumstances of this case, taking into consideration this lady's health, of which the husband was to some degree aware, and taking into consideration the fact that he knew she was frightened of him, molestation has plainly been made out in the present case, as in substance is admitted by the husband himself in such a passage in his affidavit as that to which I have referred.

I The petitioner here must surely dread the day when the respondent is released from prison; the thought of his release must have given rise to an element of impending physical violence to her. The petitioner's position here is worse off than the innocent wife in *Horner v Horner* [1982] 2 All ER 495; [1982] 2 WLR 914. There the parties to the marriage had separated.

After the separation the wife complained that her husband had been harassing her in all kinds of ways, including handing her threatening letters, intercepting her on the way to the station, and so on. As a result of this, the wife successfully applied to the magistrates' court for an order that the husband should not use, or threaten to use violence against her. A power of arrest was attached to the order. After the order was made, however, the husband started harassing the wife in a manner which did not involve violence or the threat of violence to her. As such the wife applied to the county court judge for an order under the BDVMPA which gives county court judges wider powers than magistrates. The county court judge dismissed the application stating that the wife should have gone back to the magistrates' court. The wife appealed. The Court of Appeal allowed the appeal on the ground that the husband's later conduct did not fall within s 16(2) of the Domestic Proceedings and Magistrates' Courts Act 1978 but fell within the wider non-molestation provisions in the BDVMPA. Section 1(1)(a) of the BDVMPA allows the court to make an order 'restraining the other party to the marriage from molesting the applicant'. Such an order is not restricted to physical harm or threats of such harm. It was said that even psychological harm to the applicant is included and this will include pestering, causing trouble, vexing, annoying and putting to inconvenience.

Though the facts in *Horner v Horner* were fairly mild as compared to what the petitioner here had suffered at the hands of the irate respondent, yet in both cases there appears to be a similar thread that runs through them in that both parties were separated; and though *Horner v Horner* turned on the scope of s 1(1)(a) of the BDVMPA in importing culpability on the errant husband there, here the DVA cannot assist the petitioner, yet the principles enunciated in *Horner v Horner* are germane and ought to apply to the petitioner here.

For the reasons adumbrated above, I ordered that the respondent be restrained from molesting the petitioner.

That the respondent be excluded from the matrimonial home or a part of the matrimonial home or from a specified area in which the matrimonial home is included.

This is in fact an exclusion order sought for by the petitioner.

There is no provision in the Act for an exclusion order. *Bagher Singh v Chanan Singh* [1961] MLJ 328, CA, is authority for the proposition that s 3(1) of the Civil Law Ordinance 1956 (now Act), could be invoked only where there is a lacuna in the law. That section reads as follows (this is the Civil Law Act 1956):

> Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956.

A And the proviso thereto reads as follows:

> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

B The Privy Council in *HG Warren v Tay Say Geok & Ors* [1965] 1 MLJ 44, PC, held that by s 3 of the Civil Law Ordinance 1956, the courts of Malaya apply the common law of England and the rules of equity as there administered save in so far as other provision is made by any written law in force in the Federation. There is a proviso that such law and rules shall C be applied so far only as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

With these principles in mind, it is appropriate to refer to s 1(1)(c) and (2) of the BDVMPA and for convenience they are reproduced below:

D (1) Without prejudice to the jurisdiction of the High Court, on an application by a party to a marriage a county court shall have jurisdiction to grant an injunction containing one or more of the following provisions, namely —

...

(c) a provision excluding the other party from the matrimonial home E or a part of the matrimonial home or from a specified area in which the matrimonial home is included;

(2) Subsection (1) above shall apply to a man and a woman who are living with each other in the same household as husband and wife as it applies to a marriage and any reference to the matrimonial home shall be construed accordingly.

F The words 'are living' in sub-s (2) of s 1 of the BDVMPA have been explained by Lord Denning MR in *Davis v Johnson* [1979] AC 264 at p 275; [1978] 1 All ER 841 at p 850; [1978] 2 WLR 182 at p 191:

> To my mind these words do not present any difficulty. They are used to G denote the relationship between the parties before the incident which gives rise to the application. If they were then living together in the same household as husband and wife, that is enough.

Here, the petitioner had been living separately from the respondent for eight long years prior to the near fatal attack at the taxi stand. They cannot therefore be said to be living together in the same household. Be that as it H may, from the authorities, the duration of the exclusion orders can be said to be temporary in nature. Thus, in *Davis v Johnson* [1978] 1 All ER 1132 at p 1146; [1978] 2 WLR 553 at p 569, Lord Dilhorne described these orders as 'the provision of immediate relief not a permanent resolution of a situation arising on the break up of a marriage'. In *Hopper v Hopper* I [1979] 1 All ER 181 at p 185; [1978]1 WLR 1342 at p 1345, Ormrod LJ stated that the courts should 'always have clearly in mind that they are dealing with the problem on a short term basis and the injunctions which are granted should be either expressly limited in some way or it should be

made perfectly clear to both parties that the protection of the injunction will be withdrawn after a lapse of a reasonable time'. In *Davis v Johnson*, Lord Scarman stated that 'the remedy is available to deal with an emergency ... The order must be discontinued as soon as it is clear on the application of either or both family partners, that it is no longer needed'.

A book entitled *Family Law* by PJ Pace, at p 105 contains an interesting passage on exclusion which bears repetition. The learned author there stated:

> While it has been said that an injunction excluding one spouse from the matrimonial home (as opposed to one restraining molestation) is a 'drastic order' (*Hall v Hall* [1971] 1 All ER 762; [1971] 1 WLR 404, CA), it is recognized that it is 'fair, just and reasonable' that a spouse should be excluded, the court will so order (*Walker v Walker* [1978] 3 All ER 141; [1978] 1 WLR 533, CA). In deciding whether to make such an order the court will have regard to such matters as:
>
> (a) the parties' behaviour;
>
> (b) the effect on the children if exclusion is, or is not, ordered;
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> (c) the personal circumstances of the person sought to be excluded;
>
> (d) the accommodation available to the parties;
>
> (e) the likelihood of injuries to the parties; and
>
> (f) the parties' health.

At the local scene, although s 6(1)(a)–(f) together with sub-ss (3) and (4) of s 6 of the DVA (which is not applicable as explained in the early part of this judgment) provide for an order excluding the errant husband from the shared residence or a specified part of the shared residence, yet such an order would be revoked if a suitable alternative residence is found for the protected person (the innocent housewife). 'Alternative residence' is defined in the DVA as 'premises or accommodation which the victim is or has been compelled to seek or move into as a result of domestic violence'.

In the context of the present case, the petitioner prays that the exclusion order be handed down against the respondent in respect of house No 26, Lorong Cengal, Taman Kuso, 81900 Kota Tinggi, Johor. Though it may appear to be a draconian remedy yet it is a necessary evil. As a wife, the petitioner's position must be distinguished from a 'mistress' where the relationship may be said to be casual, impermanent, fleeting and secret. When the respondent is released from prison, he has a house to go to. He should not be unduly worried about accommodation.

For the reasons aforesaid, I also ordered the exclusion order as prayed for by the petitioner and this was in regard to house No 26, Lorong Cengal, Taman Kuso, 81900 Kota Tinggi, Johor.

Petition allowed.

Reported by Azra Azman